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IN THE

Supreme Court of the United States

No. 73-645

JOSEPH CARDILLO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AARON SCHACHER
Counsel for Petitioner
32 Court Street
Brooklyn, New York
(212) 855-1003

Of Counsel:
AARON J. JAFFE
401 Broadway
New York, New York
(212) 966-6790

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, JOSEPH CARDILLO, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on the 16th day of August, 1973.

OPINION

No opinion was rendered by the United States Court of Appeals for the Second Circuit.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was rendered on the 16th day of August, 1973. A timely application for an extension of time in which to file the petition for certiorari was made on the 14th day of September, 1973 and granted by Mr. Justice Marshall, and this petition for certiorari was filed within the thirty day extended period.

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did the prosecutor's trial tactics vitiate any possibility of a fair trial?

2. Was the proof sufficient that the petitioner voluntarily and knowingly joined an ongoing conspiracy?

3. Did the Court properly charge the element that the petitioner was required to have actual knowledge that the lighters were purloined.

STATEMENT OF FACTS

The petitioner, Joseph Cardillo, was convicted in the United States District Court for the Eastern District of New York (Dooling, J.) of violations of Title 18, U.S.C. Section 959 and 2 and Title 18, U.S.C. Section 371.

The petitioner was sentenced to serve a term of three years pursuant to Title 18, U.S.C. Section 365 and to be confined for a period of six months in a jail type institution. Execution of the remainder of the sentence was suspended. An additional term of three years probation was imposed.

The conviction was unanimously affirmed without opinion, after argument, by the United States Court of Appeals for the Second Circuit on August 16, 1973.

Joseph Cardillo is at liberty on bond pending the determination of this application.

Joseph Matorano, known amongst his friends as "Bayonne Joe" pleaded guilty to one count of an indictment and avoided a jail term as he had on two prior occasions (82, 83, 180-182).[1]

On July 19, he was assigned by his employer, Callahan & Son Trucking Co., to deliver and pick-up freight along the Brooklyn waterfront (85-86). By chance, at Pier 39, he met Emilio Iovino, a gentleman whom he had known for several

[1] Refers to the pagination in the Appendix on Appeal.

months (87-89). The theft of fifteen cases of Japanese lighters was agreed upon after Matorano was assured that their removal would present no problems. The feat was accomplished and Matorano departed with the lighters (89-90, 91-94, 169).

As Matorano awaited the imminent arrival of Iovino at a diner, he accosted several members of his guild and offered to peddle the lighters. (186, 188, 194-195, 219). Iovino failed to appear, and Matorano, laden with this mass of stolen merchandise, called his employer and explained its presence – freight that belonged to another driver. This practice of swapping freight was a sanctioned trade practice. It enabled truckers to complete their daily schedules (97, 98, 185). After checking the 39th Street Diner for Iovino, Matorano left for his Jersey City base (99, 197).

The following day, "Bayonne Joe" returned to the Brooklyn piers (115-116). At lunch in Joy's Pub, he again called Iovino and failed to reach him (117, 118). At 2:15 P.M., he spoke with Iovino and was told to wait at the Pub (119).

About a half hour later, Stephen Economy, a man who labored on Pier 57 and was known to Matorana, appeared and asked, "Joe, do you have the lighters?"[2] (120,

[2]The arrival of Economy and the unidentified man was observed by Agents Dugan and Walsh of the Waterfront Commission. A brown Buick registered to Economy was used (366-368, 369, 384). Their re-entry at 4:15 P.M. was also observed and their emergence and conversation with Matorana corroborated Matorana's testimony (369-370, 384, 385). Matorana was seen to enter his truck and leave, followed by the Agents.

123, 230, 236-237). Economy disclosed that he had a buyer. He suggested that Matorana await his return (123). Ten minutes later, Economy and an unidentified man returned – a man whom Matorana had seen on other occasions, either on the piers or in a local tavern (124, 232, 238, 239). Economy handed him a card containing the address of the Surprise Shop and told him to deliver the lighters there and to ask for the owner. Matorana was guaranteed payment (125, 126, 251). He was to receive $1,000.00 from the total sales price of $3,500.00 (307). The three men left the pub together (250).

Matorana parked in front of the Surprise Shop and Cardillo was pointed out to him by the cashier. He had never seen Mr. Cardillo before (144, 273-274). He showed Cardillo the card and told him that he had fifteen cases to deliver, without disclosing the contents or that the lighters had been stolen (145, 276). He was told to put the freight into the cellar (145, 147).[3]

---

[3]Agent Dugan observed Matorana park in front of the Surprise Shop and enter that store (371, 387). Simultaneously, he noted the arrival of Economy across the street, who, after looking about, entered a candy store (372). Dugan observed the unloading process by Matorana, Marangelli, and Cardillo. A case was unloaded and dragged toward the cellar, where Cardillo slid it down the stairs and into the cellar (374, 375). After a second case had been unloaded and Matorana left his truck and entered the store, Agent Dugan ordered his partner to arrest him. Dugan arrested Cardillo and the youth was allowed to leave (377).

Economy was ultimately arrested by Agent Samuel Chambers in a candy store, after he had been overheard to say, "The cops are here." (401, 402, 407). Chambers' presence was happenstance. He appeared on his own initiative and was directed by Agent Dugan to make the arrest (399, 400, 406).

As he unloaded, he was assisted by a youth and the appellant. After two cases had been unloaded, Matorana was summoned to the telephone (145, 256, 261). Economy, the caller, told him, "Joe, Steve. There is cops all around." (145, 258). He returned to his truck and saw Cardillo in custody (146). He admitted that he lacked the necessary documentation and conceded that the crates were stolen (146).[4]

The Case for Cardillo

Joseph Cardillo, husband, father, and veteran, at the age of 48 suffered his first criminal conviction. His life was exemplary and he was a respected member of his community. He worked hard as the manager of the Surprise Shop.[5] To improve his status, he had attended college for approximately two years (501, 529).

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[4]The purloined freight was consigned to E&S Freidman Associates of Merrick, Long Island by the Ace Trading Company of Tokyo, Japan (323, 326). Each case was marked with a diamond figure and inside this figure were the letters "INA." (325, Gov. Ex. 1). The lighters were valued at approximately $90,000.00.

It should be noted that the facts presented are those that effect the petitioner Cardillo. It is presumed that counsel for the petitioner Economy will furnish the facts respecting his client.

Iovino was acquitted.

---

[5]Cardillo, at the time of his arrest, was a stockholder in the corporation that controlled the Surprise Shop. He was its secretary-treasurer. His stock had not been issued, and he held an equal interest with Emmanuel Mangano (503, 544, 545). Mangano, in addition, worked at Pier 57 and would come to the store to do the clerical chores in the evening (533, 536, 537, 549).

The Shop sold a variety of wares, including school supplies imported from Japan, Hong Kong, and Korea. Cardillo's duties were many – he managed the Shop, supervised the personnel, ordered the merchandise, and assisted in selling (501-502, 504, 506-507, 600). The packaging of the goods delivered also was varied, running the gamut from corrugated cartons and wooden crates to plastic containers (508).

On July 20, he had busied himself in the store. He had conferred with two salesmen and, at about 1:00 P.M., he left to attend a luncheon at the St. Mary's Spar of the Sea Parish in honor of the Mayor (509). This luncheon was sponsored by a civic organization that concerned itself with community affairs and problems. The appellant returned to the store at about 4:30 P.M., and found it very crowded and busy. He assisted in waiting on customers, priced certain items, and drafted a cosmetic order (511, 512).

Suddenly he was interrupted by a driver who announced that, "I have seven," without disclosing anything further (512, 514). No card was shown him. The store distributed its cards throughout the community (527, 528). He told Matorana, whom he had never met or seen before, to put the crates in the cellar, and that a young man would help him (513). At the time, he was expecting large deliveries of school supplies, and he believed that this was one (513, 513a, 552, 554). His conversation with Matorana was not unusual. For the most part, truckmen usually deliver, and after completing their tasks, display the shipping documents (514). Where the delivery is small and the items also small, the

delivery is made and the documents displayed simultaneously (515). The papers do not indicate the character of the merchandise, but rather the number of packages delivered (515).[6] He dispatched a youth, Guy Marangelli to help the driver and joined them in the effort (558, 559). He noted that the crate was heavy as he eased it into the cellar (517). He had moved the crate in such a position that he was unable to see the markings (516, 560, Gov. Ex. 1).[7] He started to move a second crate when he was accosted by the Agents and he and Marangelli were arrested (519). He told the agents that he was unaware of the contents (521, 522).

[6]Salvatoe Bumbaca, a part time employee, corroborated Cardillo's version of the delivery procedures at the store (603, 608). Some truckmen would deliver directly into the store and upon completion would show the shipping documents (603, 604, 608). The documents do not disclose the character of the contents, but rather the number of packages delivered. Content is determined after the package is opened (636). There were occasions where the bill of lading was shown prior to delivery. This occurred when a delivery was small. Containers varied, occasionally wooden crates were used. Some crates, containing china, were very heavy (605). In storing the crates, a heavy one would be placed on its side and slipped through the cellar. The physical layout and the cellar opening precluded any other technique. Wooden slides were not then in use, having been installed three weeks prior to the trial (607). Louis Esposito, who frequently made deliveries to the Surprise Shop, generally presented his documents after he had completed the delivery (647, 650, 652).

[7]Guy Marangelli, a youth and a part time worker, was present when Cardillo was arrested. Matorana asked him the whereabouts of the "boss," and he pointed to Mr. Cardillo (663). Later, he was directed to help Matorana in the unloading of the truck and was joined by Cardillo. The initial case, laid flat on its side, was jockeyed to the cellar opening and slid into the cellar. No writings were visible (666). Sliding boards were not then in use. These were installed about three weeks prior to trial (671). An officer arrested him, and after Mr. Cardillo appeared, he was told "to get lost." (667, 668).

Salvatore J. Scotto, who knew Cardillo, testified that his reputation for truthfulness and honesty was good (645), saying that the community expressed shock when it learned of the appellant's arrest (645).

POINT I

The Prosecutor's trial tactics vitiated any possibility of a fair trial.

A prosecutor may strike hard blows but not foul ones. This prosecutor was vigorous but in his vigor he forgot the teaching of *United States v. Berger*, 295 U.S. 78 (1935). His technique was simple – a concentrated and unsubtle effort to link or create a Cardillo-Mangano-Economy axis. His success precluded a fair trial. His proof established guilt by association and not guilt beyond a reasonable doubt.

The record is larded with the Government's efforts to connect Economy with Mangano and vicariously Mangano with the petitioner. The fact that Mangano and Economy labored on the same pier is a fortuitous circumstance and not a crime. The fact that Mangano and the petitioner shared an interest in the Surprise Shop is not determinative of criminal conspiracy. The Government's unfair tactics had but one purpose – the substitution of prejudice for proof. By its repetitive questioning, the Government implanted the thought that Mangano, though never overtly characterized as "the unidentified man", in fact was the individual who contracted for the stolen lighters and that the petitioner was his agent who accepted them from Matorano.

Apparently the respondent justifies its behavior on the legal chestnut that the respondent "opened the door" during the respondent's direct examination:

> "Yet, Mangano's name was first brought to the jury's attention during the direct examination of Cardillo (533). Cardillo explained that Mangano was both a joint owner of the Surprise Shop with and a co-worker with Economy on the Brooklyn piers". (Respondent's Brief, p. 6, Court of Appeals)

This thrust is buttressed by referring to petitioner's counsel's argument during summation:

> "... in which he hypothesized that Mangano was the unidentified man at the meeting (1178) Cardillo's trial counsel then continued his attempt to wring all possible benefit from Mangano by asking the jury: 'What did Mr. Mangano have to do with the case? ... Could he have been the person who gave the card out, and if he did, did my client know about it?' In this way he tried to portray his client's possession of the stolen lighters as the innocent act of receiving merchandise at the store not knowing that his trusted partner, Mangano, had betrayed him by purchasing stolen property". (Respondent's Brief p. 6, Court of Appeals)

This approach has patent defects. Initially the direct examination relied upon is innocuous. It is biographical and background in nature calculated to complete a financial picture and not to infer that Mangano was the unidentified man and guilty. The inference created of petitioner seeking to portray himself as virtue engendered falls. An experienced attorney could not hope to succeed in such a blatant ploy.

Had mangano been involved, had he been the ubiquitous unidentified man, the surveilling agents would have seen him and easily have apprehended him. Respondent's argument suffers from a logical defect. The Government was the aggressor as it opened this can of worms. Petitioner's recoil was a defensive response to a massive agression.

Matorano and the agents related the presence of an unidentified man when the trio met at Joy's Pub. It was at that meeting that arrangements were completed for the lighters' disposal. Matorano had seen this man on several occasions, either on the piers or in a local tavern. The agents had seen him. Nevertheless his identity was never established. The prosecutor's persistence in alluding constantly to Mangano was provocatively deliberate.

The cross examination of the petitioner was less than subtle. The inquiry was broadened as the prosecutor's appetite remained unsated. Cardillo's awareness of Economy occurred after his arrest as did his knowledge that Mangano and Economy were pier-mates (537). The prosecutor launched a series of questions designed to create a picture that the Mangano-Cardillo relationship was both business and criminal. He elicited that Mangano knew Stephen Economy (539). He hinted that Cardillo was less than candid when he said that he never inquired of Mangano whether Mangano had made prior illicit purchases from Economy (540). This insatiable desire to lynch culminated in the following:

> Q. Well did you ever ask Mr. Mangano if he had a conversation with Mr. Economy with respect to purchasing the cigarette lighters?"

A. No.

Q. You never asked him that?

A. No. I would never ask him that because this is beyond and above Mr. Mangano to do something like this." (542)

The witness Bumbaca was bombarded with the same kind of inferences. Had he heard Cardillo ask Mangano about the lighters? Did he know whether the crates contained lighters? (626, 627) Had Mangano ever participated in the unloading or ordering of lighters? (629)

The cross examination of Stephen Economy patterned this prejudicial line. Economy admitted that he had met Mangano on Pier 57 (722-724). He had learned of Mangano's interest in the Surprise Shop during the trial. Economy was pressed as to Mangano's address, his telephone number (743, 744). The thrust was obvious – the substitution of prejudicial innuendo for hard fact. The unuttered wish was that the jury would brand Mangano a participant and that this branding would vicariously effect Cardillo.

The witness Libretti was harried by the prosecutor. He was asked if he knew Mangano. Did he know that Mangano owned a share of the Surprise Shop? Did he learn anything about Mangano from Stephen Economy? (788, 789) The Assistant United States Attorney did not vary the theme with the witness James Martyn. It was elicited that Martyn knew Mangano for about four years (828). Had he seen Mangano

and Economy together after the theft?[8] (831).

The Government has forgotten the teaching of *United v. Berger*, 295 U.S. 78 (1935). Emmanuel Mangano was used as a ghostly Judas goat, leading Cardillo to his inevitable slaughter. It was improper for the Government to use the Mangano tactic in the fashion that it did. The blows it struck were foul.

POINT II

The Government failed to prove that Joseph Cardilio was a member of the conspiracy.

It is hornbook law that the core of the crime of conspiracy is agreement – agreement among the members to commit an offense attended by an act or acts of one or more of the conspirators to effect the purpose of the conspiracy *United States v. Falcone*, 311 U.S. 205, 210 (1940). Like all criminal endeavor, intent, criminal animus is an ingredient – an intent to join and participate in the conspiracy. *United States v. Koch*, 113 F2d 982 (2nd Cir. 1940); *United States v. Reina*, 242 F2d 302 (2nd Cir. 1957); *United States v. Stromberg*, 268 F2d 256 (2nd Cir. 1959).

In order to properly convict Joseph Cardillo of the conspiracy to steal, possess, and distribute the Japanese cigarette lighters, the proof must show that he knowingly and

[8] Despite the failure of counsel to object, the error is of constitutional dimension and should be entertained by the Court.

willfully participated in the purported conspiracy, that he had knowledge of its goals and that he had a stake in its outcome. *United States v. Di Re,* 159 F2d 818 (2nd Cir. 1947). He need not know all of its objectives or all of its members to be deemed a participant. However, a temporary and fleeting association with some or all of the participants is insufficient to prove his participation. *United States v. Stromberg (supra).*

In *United States v. Geaney,* 417 F2d 1116 (2nd Cir. 1969), there was imposed upon the Government the burden of proving by a fair preponderance of the evidence, independent and non-hearsay, that a conspiracy in fact existed and that the appellant knowingly and willfully participated in it before the co-conspirators' statements are admissible against him to prove his guilt beyond a reasonable doubt. Each case determines whether the standards have been met.

Matorana and the acquitted Emilio Iovino hatched a scheme to steal a shipment of lighters passing through the channels of foreign commerce. The hapless Matorana wandered the docks hawking his wares to members of the truckmen's guild, while anxiously awaiting a sign from Iovino. Twenty-four hours elapsed as the trove smouldered in his van. Immediate disposal had been frustrated by faulty communication and amateurish execution.

If Matorana is to be believed, he was nöt with respect to Iovino, contact between him, Economy, and the unidentified man was finally made. Armed with a card bearing the address of the Surprise Shop, Matorana, followed by agents, departed for his inevitable Appointment in Samarra.

At this posture, there is not a shard of evidence to be fitted into the ancient pot that is conspiracy. There is not a smidgeon of proof that Cardillo aided or abetted in the theft. Cardillo's presence is neither apparent nor felt. There is no proof, independent, non-hearsay, or otherwise, that he joined or participated.

Assuming arguendo that Cardillo was guilty of the substantive crime of possession, that assumption furnishes no nourishment that he was a conspirator. Proof that two people committed a substantive crime does not prove that they did it through an illegal agreement. In *Linde v. United States,* 13 F2d 59 (8th Cir. 1926) a conspiracy to transport stolen automobiles across state boundaries was charged. Two of the defendants, receivers of the stolen vehicles, were acquitted of the conspiracy count, the Court writing:

> "That they may have had guilty knowledge and participation rests upon suspicion only, arising from their acquaintance and association with some or all of the other conspirators; but to establish a conspiracy to violate a criminal statute the evidence must convince that the defendants did something other than participate in the substantive offense which is the object of the conspiracy. There must, in addition thereto, be proof of the unlawful agreement."

To the same effect, *United States v. Heitler,* 274 F 401 (D.C. Cir. 1921); *Stubbs v. United States,* 249 F 571 (9th Cir.); *Bell v. United States,* 2 F2d 543 (8th Cir.); *Dickenson v. United States,* 18 F2d 887 (8th Cir.); *Burkhardt v. United States,* 13 F2d 841 (8th Cir.); *United States v. Koch,* 113 F2d 982 (2nd Cir. 1940).

The Government should concede that the record is bare of evidence that Cardillo knew any of the participants. There is no indication that he met with them or spoke with them.

The Government's trial tactics recognize the essential weakness of the case against Cardillo, both as to the conspiracy charge and the possession charge. The prosecutor used innuendo in an effort to show a relationship between Mangano-Economy and Mangano-Cardillo. As to the former, the attempt rested on the nebulous foundation that they worked on the same pier. As the latter, the thrust was grounded on a business relationship. Interspersed in these efforts was the unuttered and unproved fact that Mangano was the unidentified man. It was hoped that the fallout would condemn Cardillo. The tactic proved fruitful. Because it was an act of bad faith, it should not be rewarded.

There is no legal proof that Cardillo joined the conspiracy at its inception or as a late arriver.

POINT III

The Court erred when it failed to charge that a conviction under the second count demanded proof of actual knowledge of the theft of the lighters.

The defense argued that Joseph Cardillo did not know that the cigarette lighters had been stolen. The Surprise Shop sold a host of items whose origins were both domestic and foreign. It was a busy store whose employees were over-

whelmed during the evening rush. Mr. Cardillo, a man of many duties, managed the store. He was acquainted with its inventory, its personnel, its requirements. He wore various hats. His interests went beyond the needs of his enterprise. He engaged in community activities. Like many businessmen, he had few moments to himself.

On July 20, 1972, Joseph Cardillo was aware that shipments of school supplies were expected from Asia – Japan, Korea, and Hong Kong. The exact date of arrival was unknown to him. However, he knew that the arrival was imminent.

When Matorana appeared, his behaviour was that of a typical truck driver delivering cargo. He did not disclose the kind of wares he was intending to deliver. He did not reveal that goods were stolen. He did not know who Mr. Cardillo was. He did not display any shipping documents. Matorana simply said that he had fifteen crates.

The testimony shows that it was customary for some truckers to deliver the goods and then display the documents. Matorana's failure in that respect was not remarkable. Cardillo's state of mind was one of expectation – a shipment of some magnitude was expected. He had a right to rely, harried as he was, that the anticipated shipment was the one that Matorana carried. Matorana failed to disclose and Cardillo failed to inquire. Is it suggested that Cardillo should have inquired? Is it urged that Cardillo should have known that the fifteen crates were purloined?

Of some importance is the method used by the petitioner to place the crate in the cellar. Physically, the cellar opening and its construction could not accommodate a crate of the size containing the lighters. Hence the crate was placed on its side and slid down the cellar stairwell. This precluded any observation of its markings. Cardillo's contention that he did not know the contents of the crates or the fact that they were stolen has merit. The Court's charge on the question of knowledge becomes critical. The trial judge charging the elements required by law to be proved under Count II, said:

> "The third essential element is that the defendant whose case you are considering knew when he received or was in possession of the cigarette lighters that they were stolen goods. Again, the Government need not present direct proof of what was in the defendant's mind, but it must prove facts and circumstances from which you are able to infer beyond a reasonable doubt that the defendant knew that the goods were stolen. Possession of goods, recently stolen, unless that possession is explained, is in itself evidence from which you may, but you are not required to, infer that the defendant so having possession knew that the goods were stolen."

Cardillo's counsel excepted to this portion of the Court's charge and argued that the Court's failure to charge the language of *United States v. Fields & Hamilton*, 466 F2d 119, 120 (2nd Cir. 1972) was error (1266).

This charge, at best, was ambiguous. The Court refrained from defining the word "knowledge," despite the suggestion made in *United States v. Field et ano.*, (supra, p. 120). As this Court said in *Field* (supra):

> "This charge on an essential element of the crime – a defendant's knowledge that the goods were stolen – was inadequate and misleading. Contrary to the judge's instructions, the Government did have to prove that the defendants 'actually knew' that the beef was stolen property. See *United States v. Massarotti*, 464 F2d 1328 (2nd Cir. 1972); *United States v. Nitti*, 444 F2d 1056, 1959 (7th Cir. 1971). . . . We realize that the judge may have been attempting to distinguish between direct and circumstantial evidence, or perhaps between participating in the theft of goods or directly witnessing the theft and merely having knowledge of the theft. Only the latter, provable by circumstantial evidence, is required for conviction.

It was necessary that the Court instruct the jury that the legal standard demanded proof that Cardillo actually knew that the lighters had been stolen. It could then inform the jury what actual knowledge meant. Instead, an ambiguous instruction was given the jury – a mixture of a presumption and circumstantial evidence. The issue of defendant's actual knowledge was highly contested and presented a close question. The ambiguous charge weighted the scale against Joseph Cardillo.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

AARON SCHACHER
Counsel for Petitioner
Joseph Cardillo
32 Court Street
Brooklyn, New York
(212) 855-1003

Of Counsel

AARON J. JAFFE
401 Broadway
New York, New York
(212) 966-6790

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of August one thousand nine hundred and seventy-three.

Present: HON. WILLIAM H. MULLIGAN, HON. JAMES L. OAKES, HON. WILLIAM H. TIMBERS, Circuit Judges,

---

73-1579 — 73-1740

United States of America,
Plaintiff-Appellee,

v.

Joseph Martorana, Joseph Cardillo, Stephen Economy, and Emilio Iovino,
Defendants,

Joseph Cardillo, Stephen Economy,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

by: VINCENT A. CARLIN,
Chief Deputy Clerk

SUPREME COURT, U. S.
FILED
JAN 30 1974
MICHAEL RODAK, JR., CLERK

Nos. 73-645 and 73-651

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH CARDILLO, PETITIONER

v.

UNITED STATES OF AMERICA

STEPHEN ECONOMY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-645

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UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner Cardillo contends that the evidence was insufficient to show that he joined the conspiracy, and petitioner Economy contends that the evidence was insufficient to support his conviction for knowing possession of goods stolen from interstate commerce. Both petitioners contend that the instructions did not require the jury to find that they had actual knowledge that the goods were stolen, and that the prosecutor's trial tactics were prejudicial.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner Cardillo was convicted of possessing goods stolen from interstate commerce, knowing them to have been stolen, and of concpiracy to commit that offense, in violation of 18 U.S.C. 659 and 371. Petitioner Economy was convicted of the Section 659 possession offense. Each petitioner was sentenced to three years' imprisonment, with all but six months suspended, and placed on probation for five years.[1] The court of appeals affirmed without opinion (Pet. App.).

Joseph Martorano testified at trial that on July 19, 1972, he and Emilio Iovino[2] stole fifteen crates of imported Japanese cigarette lighters from Pier 39, Brooklyn, New York (Tr. 84-95). The lighters were placed on Martorano's truck, and it was agreed that he would wait at a diner across the street from the pier until Iovino told him where to take them (Tr. 95-97). Iovino failed to contact Martorano that day, but on July 20, 1972, he told Martorano to wait at Joy's Pub, a bar about three blocks from the 39th Street Pier (Tr. 97-103). Shortly thereafter, petitioner Economy entered that bar and asked Martorano if he had the lighters. When he replied affirmatively, Economy told him to wait there because he might have a buyer, and then left the bar (Tr. 104-123). About five or ten minutes later, Economy returned with an unidentified individual. Economy handed Martorano a business card, told him to bring the crates to the address on the card, and

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[1] Petitioner Cardillo received identical, concurrent sentences on each of the two counts on which he was convicted.

[2] Martorano pleaded guilty prior to trial and testified for the government at trial. Iovino was tried with petitioners and acquitted.

assured Martorano that he would be paid (Tr. 124-126, 366-370, 1082-1084). Martorano then drove his truck loaded with the stolen crates to the address on the card—the Surprise Shop, Inc., Union and Court Streets, Brooklyn, New York, petitioner Cardillo's place of business (Tr. 144, 370-371, 1084, 1087-1088).

When Martorano arrived at the store he parked his truck in front, entered the store, and asked for the owner. He was directed to petitioner Cardillo. He introduced himself to Cardillo, showed Cardillo the card which Economy had given him and told Cardillo that he had fifteen crates for him. Cardillo told him to put the crates in the cellar and went outside and opened the cellar door. Martorano, Cardillo and a boy who worked for Cardillo began unloading the crates. After a couple of crates had been unloaded, Martorano was informed that there was a phone call for him, and he re-entered the Surprise Shop. Economy was the caller, and he told Martorano that the cops were all around (Tr. 144-146). Meanwhile, Waterfront Commission agents, who had been maintaining surveillance on Martorano's truck that day, observed Economy park across the street from the Surprise Shop, look up and down the street for several minutes and then enter a nearby luncheonette. An agent followed him into the lucheonette, observed him making a telephone call, and heard him telling the other party on the telephone that the cops were there (Tr. 372-378, 400-402, 1088-1089).

1. There was sufficient evidence to show that Economy had possession of the stolen goods (Economy Pet. 8-10). While the evidence does not show that Economy had actual possession of the goods, it does show that he exercised such dominion and control over their disposal that he had constructive possession of the contraband.

See *United States* v. *Casalinuovo*, 350 F. 2d 207, 209 (C.A. 2). On July 20, 1972, Economy ascertained from Martorano the location of the stolen merchandise. He directed the delivery of the goods and assured the driver that he would be paid for his services. He followed the contraband to its destination, spotted the watching authorities, and alerted his accomplices to the danger. This evidence was sufficient to show that Economy exercised dominion and control over the goods. See *United States* v. *Carneglia*, 468 F. 2d 1084, 1087 (C.A. 2); *United States* v. *Marquez*, 462 F. 2d 620, 621 (C.A. 9).[3]

2. The evidence was sufficent to show that Cardillo joined the conspiracy (Cardillo Pet. 13-16).[4] Martorano testified that, at Joy's Pub, Economy stated that he might have found a buyer for the lighters. Shortly thereafter, Economy gave him Cardillo's business card and told him to deliver the lighters to that address and to ask for the owner. He further told Martorano that payment was guaranteed. When Martorano presented the card to Cardillo and stated that he had fifteen cases, Cardillo immediately indicated that he knew what Martorano was talking about by directing him to put the merchandise in the cellar without seeking any indication as to what the crates might contain. Cardillo then proceeded to open the cellar door and to assist in

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[3] *United States* v. *Romano*, 382 U.S. 136, on which petitioner Economy relies, is inapposite. It involved the statutory inferences to be drawn under 26 U.S.C. 5601(b)(1) from mere presence at an illegal distilling site and did not consider the inferences which can permissibly be drawn from an individual's possession of recently stolen goods.

[4] Although Economy adopts Cardillo's contentions (Economy Pet. 10) this point is inapplicable to him, since Economy was not convicted of conspiracy.

moving the cases inside the shop. During the unloading, Cardillo presumably saw the shipping markings on the crates signifying their foreign origin, but at no time did Cardillo ever ask to see any shipping documents or inquire as to the contents of the crates. This evidence was sufficient for the jury to infer that petitioner Cardillo knew the contents and stolen nature of the crates and thus had knowingly joined the scheme to dispose of the contraband. Moreover, Cardillo's contention that the other conspirators would have delivered fifteen crates of cigarette lighters valued at $90,000 (Tr. 325) to him without his knowledge or consent was obviously not believed by the jury.[5]

3. Petitioners' contention (Cardillo Pet. 16-19, Economy Pet. 7, 10) that the instructions failed to charge the jury that they must find actual knowledge that the lighters were stolen is without merit. On the requisite knowledge element, the court charged as follows (Cardillo Pet. 18):

> The third essential element is that the defendant whose case you are considering knew when he received or was in possession of the cigarette lighters that they were stolen goods. Again, the government need not present direct proof of what was in the defendant's mind, but it must prove facts and circumstances from which you are able to infer beyond a reasonable doubt that the defendant knew that the goods were stolen. Possession of goods, recently stolen, unless that possession is explained, is in itself evidence from which

[5] Petitioner Cardillo does not challenge the sufficiency of the evidence supporting his conviction on the substantive possession count, on which he received a concurrent sentence. See *Barnes* v. *United States*, 412 U.S. 837, 848.

> you may, but you are not required to, infer that the defendant so having possession knew that the goods were stolen.

This instruction clearly and correctly charged the jury that they must find that the defendants actually knew that the lighters were stolen, and petitioners suggest no reason to believe that the jury disregarded those instructions.[6]

4. Petitioners' claim of prosecutorial misconduct (Cardillo Pet. 9-13; Economy Pet. 10) is insubstantial. The contention is that certain questions asked by the prosecutor concerning one Emmanuel Mangano were prejudicial. However, Mangano's name was first introduced by petitioner Cardillo during his direct testimony (Tr. 533), in which he explained that Mangano was both a joint owner of the Surprise Shop and a co-worker with Economy on the Brooklyn piers. In closing argument the defense argued that the unidentified man at the meeting at Joy's Pub could have been Mangano, and that the lighters might have been delivered to the Surprise Shop at his instigation rather than Cardillo's. Thus, it was the defense rather than the prosecution who attempted to interject Mangano into the case. Moreover, petitioners concede that no objection was made at trial to the questions which petitioners now assign as error.

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[6] Petitioners' reliance on *United States* v. *Fields*, 466 F. 2d 119 (CA. 2), is misplaced for, contrary to the charge here, there the jury was instructed that the government need not prove that the defendant knew the property was stolen but need only adduce evidence which tends to prove knowledge.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.